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IN THE

Supreme Court of the United States

RYAN AUSTIN COLLINS, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

Brief *Amicus Curiae* of United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

The Supreme Court of Virginia erred when it ruled that the constitutionality of the search of a motorcycle within the curtilage of a house should be decided based on this Court's automobile exception to the Fourth Amendment warrant requirement. That ruling was grounded exclusively on this Court's 1984 decision in Maryland v. Dyson, because the motorcycle (i) was

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

mobile and (ii) allegedly constituted contraband. However, as clearly demonstrated by Petitioner in his petition for rehearing to the Supreme Court of Virginia, the officers conducting the warrantless search of the curtilage of the house where Collins was living had no reason to believe the motorcycle had been stolen at the time of the search, rendering the Dyson rule inapplicable.

Petitioner repeatedly argued below the applicability of this Court's recent decisions in United States v. Jones and Florida v. Jardines, which re-established the primacy of the Fourth Amendment's protection of property, and instructs courts to resort to expectations of privacy only when the property principles do not resolve the case in favor of the person seized or searched. Nevertheless, the Supreme Court of Virginia did not even address the applicability of those cases. Had those precedents been applied, it would have been clear that the officers who invaded the curtilage of a home without invitation or warrant were no better than trespassers.

Even if the automobile exception could be said to apply to this case, it would not justify a warrantless trespass to conduct the search within the curtilage of a home. The mere fact that a vehicle is moveable cannot justify such a search of private property without a warrant. The Virginia Supreme Court's assumption that this Court's automobile exception was unlimited was error.

Lastly, should this Court grant certiorari to consider the applicability of the automobile exception

on private property, it should use this case to reconsider the automobile exception, which has been expanded incrementally in a long series of cases to the point where it bears no relation to the purposes for which it was originally crafted in Carroll v. United States over 90 years ago.

ARGUMENT

I. THE SUPREME COURT OF VIRGINIA MISSTATED THE FACTS UPON WHICH IT FOUND PROBABLE CAUSE.

All three Virginia courts determined that the police had probable cause to enter the property where Collins resided as well as to search the motorcycle. The Supreme Court of Virginia, however, made a very different probable cause finding — one that contradicts the record, raising serious questions about the integrity of the Court's decision that the search fits within the automobile exception to the warrant requirement.

After its pretrial hearing on Collins' motion to dismiss, the trial court found the police had probable cause to believe the motorcycle parked at the residence was the same motorcycle that had **eluded** the police. *See* App. 106-07. Likewise, the Court of Appeals agreed that there was probable cause "to believe that the motorcycle was the one from the **eluding** incident." 773 S.E.2d at 45. The Supreme Court of Virginia, however, claimed that "[t]he facts of this case" show "Officer Rhodes had several reasons to believe the motorcycle was **contraband**" — *i.e.*, that

it was **stolen property**. 790 S.E.2d at 617. However, there is simply nothing in the record to support the Virginia Supreme Court's assertion that the police had probable cause to believe Collins' motorcycle was stolen at the time they performed their search. *See Amicus* App at 2-4.

The Supreme Court of Virginia stated that probable cause was based on the fact that "Eric Jones had informed Officer Rhodes that he sold Collins the motorcycle **with the warning that it was stolen. Therefore**, when he arrived at the ... residence ... Officer Rhodes **already suspected that the motorcycle** which had eluded him and Officer McCall **was stolen property**." 790 S.E.2d at 617. This finding was not based on anything known to the officers at the time of the search, but erroneously based on Jones' testimony "at trial" that he "sold Collins the motorcycle in April 2013 with the caveat that the motorcycle lacked title and was stolen." *Id.* at 613.

In his petition for rehearing below, Collins alerted the Supreme Court of Virginia to this discrepancy, documenting it as both "unsupported by the record and inconsistent with Officer Rhodes' testimony." *See Amicus* App. at 2. Additionally, Collins' petition reminded the Court that "[p]robable cause can 'only be measured by objective facts known to the police officer prior to the search" citing California v. Minjares, 443 U.S. 916, 921 (1979). *Id.* at 4.

According to both the record and factual recitations by all three courts, at the time that he performed his

search, the only thing Officer Rhodes knew was that Jones had sold Collins a motorcycle. It was only "**[l]ater, at trial**" that Jones testified that both he and Collins knew the motorcycle was stolen. If Jones had told Officer Rhodes that the motorcycle was stolen when they spoke on July 25, 2013 (App. at 80), as the Supreme Court of Virginia claimed, it would make little sense that Officer Rhodes had done nothing with the information until the search of Collins' motorcycle three months later on September 25, 2013.[2]

As Collins pointed out in his rehearing petition, the Virginia Supreme Court's probable cause finding "cannot be relied upon as justification for the warrantless search," because of its erroneous factual assumption that prior to the search of the curtilage of Collins property they had reason to believe that the motorcycle was "contraband." *Amicus* App. at 4. This error was both material and prejudicial.

The Supreme Court of Virginia explained that, although the Court of Appeals had "analyzed the issue based on probable cause and exigent circumstances, this case is more appropriately resolved under the automobile exception" (App. 12), resting its opinion upon a 1982 decision of this Court:

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[2] *See* App. at 101 (trial counsel argued that learning "subsequent to [the search] that vehicle was, in fact, reported stolen had nothing to do with eluding which was the reason for the ... search in the first place."); *see also* App. at 85 (Officer Rhodes admitting that he did not believe the motorcycle to be contraband — *i.e.*, stolen — when he searched it).

> The Supreme Court has articulated a simple bright-line test for the automobile exception: "[i]f a car [i] is readily mobile and [ii] probable cause exists to believe it **contains contraband**, the Fourth Amendment permits police to search the vehicle without more. [Citing Maryland v. Dyson, 527 U.S. 465, 467 (1982).] Applying that test to this case, we hold that Officer Rhodes' warrantless search of the motorcycle was justified under the automobile exception.... [App. 14-15 (emphasis added).]

In order to establish the linkage between the facts of this case and the Dyson rule, the Supreme Court of Virginia wrongly claimed that "Officer Rhodes Had Probable Cause to Believe the Motorcycle **Was Contraband.**"[3] App. 15. This false claim that the motorcycle "**was contraband,**" permitted the court to decide the case under the Dyson rule which applied only "if" a vehicle "**contains contraband**" (and, thus, arguably if a vehicle **is** contraband). The Virginia Supreme Court's application of the automobile exception is unsupported and cannot stand.

The Court's failure to grant Collins' rehearing petition to remedy this obvious error undermines the integrity of the Virginia Supreme Court's interpretation and application of this Court's

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[3] The court assumed without any discussion that there was no distinction between a vehicle which "**contains contraband**" and one which "**was contraband.**"

automobile exception to this case, necessitating review by this Court. *See* 790 S.E.2d at 613.

II. THE SUPREME COURT OF VIRGINIA MISTAKENLY IGNORED JONES AND JARDINES TO THE PREJUDICE OF THE PETITIONER.

A. The Supreme Court of Virginia Completely Ignored the Property Baseline Established in Jones and Jardines.

The Supreme Court of Virginia granted review to decide two assignments of error to the lower courts: whether "the officer **illegally trespassed onto private property** for [the] purpose of conducting a search in violation of [the] Fourth Amendment," and whether "the officer acted lawfully under the Fourth Amendment in **entering the property** and searching the motorcycle." 790 S.E.2d at 616 (emphasis added). However, the court disregarded those questions, resolving Collins' property claims as if they were based upon expectations of privacy under the automobile exception.

At the pretrial hearing on Collins' motion to suppress, defense counsel correctly noted that "the two cases that are on point are ... United States v. Jones and Florida v. Jardines." App. at 97. Counsel correctly explained that Jones "revolv[es] around trespass on ... property [and] has nothing to do with ... reasonable expectation [of] privacy." *Id.* Counsel noted that Jardines mandates that "expectation of privacy ... is not an issue" and that "officers may not

enter [the home or curtilage] for the purposes of doing a search without a warrant." *Id.* at 98.

In denying Collins' motion to suppress, the trial court revealed that it did not understand that Jardines had been based on property rights, claiming that "while I don't find the facts [from Jardines] to be similar [to the facts here], I find the issue to be similar and that is what is a reasonable expectation of privacy." App. at 105.

The Virginia Court of Appeals also addressed Jones and Jardines, deciding that "neither [case] addresses any exceptions to [Fourth Amendment] protections." 773 S.E.2d at 621. In a lengthy footnote, the court dismissed the applicability of Jones because the automobile exception issue had not been argued in the case. *Id.* at 621, n.1. In a separate footnote, the court of appeals also minimized and dismissed Jardines, claiming that it "merely [offers] support for the familiar concept that the Fourth Amendment protects the curtilage of the home...." *Id.* at 621, n.2. In other words, the Court of Appeals treated Jones and Jardines as if the principles therein have absolutely no application or relevance to the automobile exception, even when that exception is used to justify a search of a vehicle within the curtilage of a home.

Whereas the lower Virginia courts gave Jones and Jardines short shrift, the Supreme Court of Virginia ignored them completely,[4] even though Jones and

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[4] Only incidentally did the Supreme Court of Virginia quote from Jardines to define what constitutes the curtilage of the home.

Jardines constituted the central legal argument made by defense counsel in the trial court.

But how can a court decide a Fourth Amendment case about automobiles, and completely ignore Jones? And how can it decide such a case about the curtilage of a home, without even discussing Jardines? Both Jones and Jardines apply factually and legally to this case — and yet the Supreme Court of Virginia ignored them both.

B. Jones and Jardines Restored the Fourth Amendment's Property Baseline.

Beginning in the 1960's, this Court began to decide Fourth Amendment cases based on the atextual view that the Fourth Amendment protects only a right to privacy (a right first articulated in an 1890 law review article co-authored by then-attorney Louis Brandeis).[5] Although initially foretold in Warden v. Hayden, 387 U.S. 294 (1967), and applied soon thereafter in Katz v. United States, 389 U.S. 347 (1967) as a way to increase the Fourth Amendment protection of unfamiliar modern technologies, the right to privacy soon began to have precisely the opposite effect. Over the next 45 years, many protections of the Fourth Amendment have been slowly eroded based on judges' perceptions of what governmental intrusions were necessary, as

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App. 30.

[5] *See* S. Warren & L. Brandeis, "The Right to Privacy" 4 HARVARD L. REV. 193 (Dec. 15, 1890).

balanced against what expectations of privacy were reasonable.[6]

In 2012, the privacy stranglehold on the Fourth Amendment ended. In United States v. Jones, government agents placed a GPS tracking device on a suspect's Jeep, and then used the transmitter to track his location over an extended period of time. Unsurprisingly, based on nearly five decades of privacy precedents, the government argued that "no search occurred here, since Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads." *Id.* at 950. But the Court refused to grant the government *carte blanche* authority to track Americans as if they were dogs embedded with microchips.

In an effort to perform triage on a hemorrhaging Fourth Amendment, the Court in Jones returned to first principles, and rediscovered (or at least reaffirmed) that the Fourth Amendment first and foremost protects fixed individual property rights free from government intrusion and, only secondarily, protects evolving privacy considerations. *Id.* at 949-51. From that perspective, the Court found that attaching the device was a "physical intrusion" under the Fourth Amendment, which violated Jones's right to exclusive possession. *Id.*

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[6] *See* Katz at 360 (Harlan, J., concurring, coining the phrase "reasonable expectation of privacy").

The following year, the Court continued its revitalization of the Fourth Amendment's property roots in Florida v. Jardines, 133 S.Ct. 1409 (2013). There, in a similar fact pattern to this case, this Court determined that the police may not, without a warrant, trespass on a person's private property, enter the curtilage of his home, and use a drug-sniffing dog to search the outside of the home for drugs. *Id.* at 1414-15. After finding that the area searched by the police and dog was "constitutionally protected," the Court considered "whether [the search] was **accomplished through an unlicensed physical intrusion**." *Id.* at 1415 (emphasis added). The Court found that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" was not part of the customary societal license accorded to persons coming to the front door of a home. *Id.* at 1415-17.

As it had in Jones, the government in Jardines argued that an "investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest." *Id.* at 1417. The Court rejected that rationale and, relying upon Jones, determined that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*," since the property law baseline had been breached by the physical intrusion upon Jardines' house in violation of the Fourth Amendment. Jardines at 1417.

Thus, in both Jones and Jardines, this Court addressed first whether the government intrusions — involving an automobile in Jones and the curtilage of

a home in Jardines — compromised any Fourth Amendment property right in "persons, houses, papers, [or] effects." *See* Jones at 949 and Jardines at 1416. Yet the Virginia courts failed to address Collins' claimed rights in the curtilage of his home and in the belongings in his driveway.

C. The Police Violated Collins' Fourth Amendment Property Rights.

The Supreme Court of Virginia majority opinion describes this case as one which involves "the search of the motorcycle," even though the police first removed a tarp to uncover the motorcycle. 790 S.E.2d at 621. That is akin to saying a police officer who opens a briefcase to search the papers inside it has not searched the briefcase. Writing in dissent, Justice Mims claimed that "Officer Rhodes did not search an automobile, he searched a tarp." *Id.* at 26. In reality, Officer Rhodes searched both the motorcycle and the tarp — but just as importantly, he also searched the curtilage of the home — the private property where he was trespassing.[7] The courts below failed to recognize this reality, even though the Supreme Court of Virginia admitted that "Collins has consistently characterized Officer Rhodes' conduct as an 'illegal trespass'...." *Id.* at 620.

As in Jardines, the property "principle renders this case a straightforward one." Jardines at 1414. The

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[7] Had the police had obtained a warrant, it no doubt would have been a warrant to search Collins' **property** for the motorcycle that had eluded them.

officers "were gathering information in an area belonging to [Collins] and immediately surrounding his house ... which [this Court has] held enjoys protection as part of the home itself.[8] And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* As this Court noted, "A police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* at 1416.

No one disputes that a Fourth Amendment "search" occurred in this case. As in Jones, "[t]he Government physically occupied private property for the purpose of obtaining information." Jones at 949. And, as in Jardines, the police trespassed on private property to snoop around the property, which **was** "'**more** than any private citizen might do.'" Furthermore, Jardines concluded that "[t]here is no customary invitation to do *that*." Jardines at 1416 (emphasis added). The only question, then, is whether the "automobile exception" to the warrant requirement can be applied — without violating the principles from Jones and Jardines — to override a person's property interest in his "houses and effects." The answer to that question is most certainly no.

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[8] Unless the police could demonstrate they had a superior property interest justifying their presence on the property where Collins lived, they were no more than common-law trespassers, poking around someone's garage.

III. THE COURTS BELOW HAVE MISUSED THE AUTOMOBILE EXCEPTION TO SWALLOW UP THE FOURTH AMENDMENT.

A. The Original Purposes of the Automobile Exception Do Not Apply to this Case.

Nearly a half century ago, the Court described the automobile exception, like all exceptions to the Fourth Amendment, as having been "'jealously and carefully drawn.'" Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The Court asserted that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461. Unfortunately, the opposite has been the case.

As Justices Souter and Breyer put it, the Court has "permit[ted] bare convenience to overcome our established preference for the warrant process...." Florida v. White, 526 U.S. 559, 573 (1999). These justices cautioned that "the exceptions have all but swallowed the general rule." *Id.* at 569. Nearly two decades later, the probable cause and warrant requirements have become little more than platitudes for trial courts — to be recited before being disregarded. As one commentator put it, "[w]hile the Court continues to pay lip service to this catechism, its actions have transformed [the Fourth Amendment's requirements] into an historic relic...." L. Katz, "The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement," 36 CASE W. RES. 375, 376 (1986).

What began as a modest waiver of Fourth Amendment principles in Carroll has now become a broad abdication of the Court's responsibility to defend Americans from arbitrary intrusions by government.

With this case, the Supreme Court of Virginia has taken the automobile exception where it has not gone before, holding that the Fourth Amendment's requirements do not apply to persons, houses, and effects **wherever a vehicle is located**. In this case, in order to search the actual motorcycle they were after, the police first trespassed into the curtilage of Collins' home, then they lifted his tarp off the motorcycle, and then they examined the motorcycle, discovering that it was stolen. They then knocked on the front door and arrested Collins without a warrant. *See* 790 S.E.2d at 614.

A long line of cases has relegated the automobile to the status of second-class type of property,[9] unworthy of protection under the Fourth Amendment. However, if the opinion of the Supreme Court of Virginia is permitted to stand, the mere involvement of an automobile in a criminal investigation will result in the destruction of all Fourth Amendment protections — not just for automobiles, but for whatever else may be in the vicinity.

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[9] Congress may have distinguished between homes and automobiles in 1925 in the National Prohibition Act. *See also* California v. Carney, 471 U.S. 386 (1985). Importantly, the Fourth Amendment, however, makes no such distinctions. It protects "persons, houses, papers, and effects" — it does not single out any of those categories for greater or lesser protection.

Under such a regime, what would stop the police from entering not only curtilage, but also a garage, to search a vehicle? Or, many homes are built with customized living spaces to house rare or expensive collectible automobiles, and at the other end of the spectrum, many homes contain living spaces within a garage. In such situations, what would stop the police from waltzing right into a home based on the automobile exception? Indeed, the Supreme Court of Virginia appears to have specifically rejected the idea that there are any limits on where the police can trespass — so long as their search involves an automobile. The court made clear that its holding was not based on reduced expectations of privacy, noting that "[t]he Court focused on the mobile characteristics rather than the exact location...." *Id.* at 619. Based on that understanding, the police literally can go anywhere that an automobile can be found. They could enter a carport, they can enter a garage, they can enter a basement, completely undermining the sanctity of the home.

The Supreme Court of Virginia justified its opinion in this case in part on the theory that "**[t]he Supreme Court has never limited the automobile exception** such that it would not apply to vehicles parked on private property." *Id.* at 619. Of course, this is a logical fallacy. Lack of disapproval does not indicate approval. Unfortunately, because this Court has routinely expanded the automobile exception, lower courts now apparently believe that the exception is limitless. As one commentor has put it, "it appears that Courts are interpreting [this Court's precedents] as carte blanche to approve the inclusion of evidence

found without a warrant, so long as an automobile was somehow involved in the crime or violation in question." K.H. Chilcoat, "The Automobile Exception Swallows the Rule: Florida v. White," 90 J. CRIM. L. & CRIMINOLOGY, 917, 945 (1999-2000).

B. The "Automobile Exception" Undermines Jones and Jardines.

Under a "reasonable expectation of privacy" analysis, persons, houses, papers, and effects are protected only when judges feel the government has gone too far. Under a property rights analysis, however, property rights are triggered the moment the police step foot onto the property without a legal right to do so. To analyze this case only from a privacy standpoint undermines the property rights baseline the Court guaranteed in Jones and Jardines. It undermines the idea that privacy rights can only add to — **but not subtract from** — the property rights baseline.

This Court's opinion in Jones told us that even a "technical trespass" is still a Fourth Amendment violation. In Jardines, the Court determined that such a search without a warrant was unreasonable. The Court looked at the license of the country to determine what sort of license an ordinary citizen had to approach a private home. The Court then held the police (with no warrant) to the same standard, deciding they could do "no more than any private citizen may do."

After Jones and Jardines, the automobile exception can no longer be understood as being confined to a person's "reasonable expectation of privacy" in his vehicle. Yet that is the modern foundation of the automobile exception. At a minimum, this Court should grant the petition to reevaluate the automobile exception in light of the property rights principles from Jones and Jardines. And, because the automobile exception undermines those principles, the Court should take this opportunity to reconsider the automobile exception, ceasing to treat the automobile as an inferior type of property under the Fourth Amendment.[10]

IV. THIS COURT SHOULD GRANT THE PETITION TO RECONSIDER THE AUTOMOBILE EXCEPTION.

We are taught that the Fourth Amendment usually requires the police to have a warrant based upon probable cause before they conduct a search. *See*

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[10] If the automobile exception cannot be justified based on privacy, then all that is left is exigency. But that provides no protection at all. If all that is required to avoid the Fourth Amendment is allegations of exigency, the police might argue that they should be permitted to search a home without a warrant. Indeed, there are far more ways for a person to hide or destroy evidence in a home than in a car. One could flush drugs down a toilet, burn bloody clothes, grind the serial number off a gun, or take a shower to wash off the evidence. While the Court of Appeals below decided this case based on a general theory of exigency, the Supreme Court of Virginia recognized that was an insufficient basis, holding that "this case is more appropriately resolved under the automobile exception." *Id.* at 616.

Coolidge v. N.H., 403 U.S. 443, 444-45 (1971). Consequently, searches without probable cause and a warrant traditionally have been considered *per se* unreasonable, and thus unconstitutional. *See* U.S. v. Ross, 456 U.S. 798, 825 (1982). Indeed, courts seem to be quite fond of continually reminding us of this maxim — right before sanctioning a search or a seizure that occurred without a warrant, and often even without probable cause. Each time, the waiver is granted based upon one of several euphemistically termed "narrowly drawn exceptions" to the warrant requirement.[11]

The problem is that one of the "exceptions" to the warrant requirement seem to apply more and more frequently, and it is a rarity for a court to require the police to obtain a warrant before they act. Exceptions to the warrant requirement now apply to police stops on the street (stop & frisk), or in a car or mobile home (automobile exception), or during an arrest (search incident to arrest) — situations where over 90 percent of involuntary police encounters with the public appear

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[11] There reportedly are at least six exceptions to the warrant requirement. **Three** are well rooted in the common law (a limited search incident to arrest, the plain view doctrine, and emergencies/hot pursuit). **One** arguably does not even involve a Fourth Amendment search (consent or waiver, whereupon police become akin to an invitee or licensee). However, **two** of the exceptions to the warrant requirement — the "stop and frisk," Terry v Ohio, 392 U.S. 1 (1968), and the "automobile exception," Carroll v. United States, 267 U.S. 132 (1925) — were created by this Court, based on little more than the **public policy preference** of the justices then on the Court to prevent the Fourth Amendment from "unreasonably" impeding police work.

to occur.[12] And in most such cases, the police are not required to have a warrant, and often not even probable cause.

A. Exigency Because of Inherent Mobility.

The "automobile exception" was birthed in 1925 in Carroll v. United States, 267 U.S. 132 (1925). The case involved the search of a vehicle pursuant to the National Prohibition Act, which provided for the warrantless search, seizure, and forfeiture of vehicles used to transport illegal liquor.[13]

As justification for the warrantless searches of automobiles, the Court cited a Congressional report which claimed that "It would take from the officers the

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[12] According to the Bureau of Justice Statistics, about 63 million Americans age 16 or older had at least one interaction with the police in 2011. Obviously, some persons had more than one encounter, and no doubt many had several or more. Approximately 49.2 percent of those interactions were classified as "involuntary contact" with the police, involving either traffic stops, street stops, arrests, or other involuntary contacts (presumably some of which occurred inside the home). L. Langton, Ph.D., and M. Durose,"Police Behavior During Traffic and Street Stops, 2011," BJS, September 2013, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

[13] At the same time, Congress prohibited the warrantless search of a "private dwelling" — even going so far as to make it a crime punishable by imprisonment for any government agent who engaged in a warrantless search of such a dwelling. *Id.* at 143-44. Ironically, here the Virginia courts use the automobile exception to justify a search of the curtilage, which this Court has held is part of the dwelling, the same as inside the home. *See* Jardines at 1414.

power that they **absolutely must have to be of any service**, for if they can not search for liquor without a warrant they might as well be discharged." *Id.* at 146 (emphasis added). Thus, the Court found that Congress intended "to make a distinction between the **necessity**[14] for a search warrant in the searching of private dwellings and in that of automobiles...." *Id.* at 147. Similarly, the Court claimed that there was "**necessary** difference between a search of a store, dwelling house or other structure ... and a search of a ship, motor boat, wagon or automobile ... where it is not practicable to secure a warrant because **the vehicle can be quickly moved**...." *Id.* at 153 (emphasis added).[15]

In later cases, the Court would boil down this "necessity" rationale as stemming from a vehicle's inherent mobility, claiming that an automobile "creates circumstances of such exigency that, as a **practical necessity**, rigorous enforcement of the warrant requirement is impossible." South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (emphasis added).

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[14] "'[U]seful,' and 'necessity' was always the 'tyrant's plea.'" C.S. Lewis, God in the Dock (1970) at 333.

[15] Of course, times have changed greatly since Carroll was decided. In Carroll, the police still were required to have probable cause to stop a vehicle, where now they need only reasonable suspicion. And these days, the police are protected by an incredibly robust form of "qualified immunity," shielding them from consequences arising from most abuses of their authority.

B. Mobility Without Exigency.

Then, in Chambers v. Maroney, 399 U.S. 42 (1970), the Court reviewed its prior holdings where "exigent circumstances" were required to search an automobile. *Id.* at 51. In Chambers, there were **no exigent circumstances,** because the automobile was being held in police custody. *Id.* at 44. Nevertheless, the Court declared that because the vehicle was still mobile, it could be searched without a warrant. *Id.* at 52. In other words, theoretical mobility — even without exigency — is enough.

C. No Mobility — So Exigency And Pervasive Regulation.

Then, in Cady v. Dombrowski, 413 U.S. 433 (1973), the Court was confronted with the search of a heavily damaged automobile that had been towed to a service station. The vehicle was **not inherently mobile** and, indeed, was inherently immobile. *Id.* at 435-37. However, the Court nevertheless assumed that there was still an exigency, since the police suspected the vehicle to contain a firearm, and alleged a search was necessary to "'protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.'" *Id.* at 443, 447.

Having now applied the automobile exception to cases where there was no exigency, and to cases where there was no mobility, an entirely new rationale was created — that automobiles and their drivers are **heavily and pervasively regulated.** *Id.* at 441. Writing for the majority, Justice Rehnquist admitted

"that this branch of the law is something less than a seamless web," *id.* at 440, admitting that the Court had now expanded the automobile exception to cases where none of the original justifications existed. *Id.* at 442-43.

D. Reduced Expectations of Privacy.

The Court further tweaked its pervasive regulation rationale, adding that, because a vehicle is in the public view, "the **expectation of privacy** with respect to one's automobile is significantly less than that relating to one's home or office." Opperman at 367 (emphasis added).[16] Essentially without explanation, the Court simply asserted that anytime the police are engaged in "'community caretaking functions,'" the Fourth Amendment's probable cause and warrant requirements do not apply, and any search the police conduct is "reasonable." *Id.* at 370.

The Court's rationale shifts from mobility, to pervasive regulation, to expectations of privacy freed it to justify use of the automobile exception "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady at 441-442.

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[16] In Opperman, the Court saw no need to require probable cause, since the defendant in that case had violated a parking ordinance, even though it technically was not a crime. There, the Court permitted a suspicion-less and warrantless "routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances." *Id.* at 365.

E. In the Face of Heightened Privacy Interests, Back to Mobility.

In California v. Carney, 471 U.S. 386 (1985), the police entered and searched a parked mobile home without a warrant — a location where privacy interests were heightened. The Court was confronted with a "'hybrid' which combines 'the mobility attribute of an automobile ... with most of the privacy characteristics of a house.'" *Id.* at 395.

The Court claimed that "the mobility of a vehicle 'is no longer the prime justification for the automobile exception; rather 'the answer lies in the diminished expectation of privacy which surrounds the automobile.'" *Id.* at 390. However, shortly after making this pronouncement, the Court ignored the obviously heightened privacy aspects of the mobile home, and swung back to its mobility justification, claiming that since the vehicle could still be mobile, that was enough to justify the search.[17] *Id.* at 393. In reaching this conclusion, the Court opened the door to the home, the one place previously thought to be off limits to warrantless searches (*see* Carroll at 147 n.5, *supra*).

F. Summary.

The automobile exception has been nothing if not flexible. The Court has used mobility as a justification

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[17] *See also* Pennsylvania v. Labron, 518 U.S. 938 (1996) (finding that inherent mobility alone is sufficient reason for a warrantless search of an automobile).

when there is no exigency, and used exigency when there is no mobility. When neither of those justifications exists, the Court has adopted new reasons, such as pervasive regulation and reduced expectations of privacy. Later, the Court relied on reduced expectations of privacy in cases where there is no mobility, and used mobility in cases where there was no reduced expectation of privacy. Thus, mobility/exigency and pervasive regulation/reduced privacy expectations appear to have become independent justifications for the automobile exception. With so many different independent justifications, the automobile exception can be (and has been) employed to sanction searches in a wide variety of circumstances.

Now, in this case, the government asked the courts below to go even further -- and to apply the automobile exception to justify a search of the curtilage of the home where the motorcycle was stored, the tarp that covered it, and even the warrantless arrest of the person inside the home. The absurdity of that request should alarm this Court. It is well past time for this Court to reexamine the automobile exception itself, and this case provides an excellent vehicle to do so.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Amicus Appendix

In the
Supreme Court of Virginia
at Richmond

Record No. 151277

RYAN AUSTIN COLLINS, *Appellant*,
v.
COMMONWEALTH OF VIRGINIA, *Appellee*.

PETITION FOR REHEARING

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Petition for Rehearing
Ryan Austin Collins v. Commonwealth of Virginia

I. The majority opinion erroneously concluded that Officer Rhodes had probable cause to believe that the motorcycle was contraband.

The Supreme Court correctly articulated the test for applying the automobile exception; namely, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband,[1] the Fourth Amendment ... permits police to search the vehicle without more." Slip. Op. at 11.

The majority stated that probable cause was based on the fact that "Eric Jones had informed Officer Rhodes that he sold Collins the motorcycle with the warning that it was stolen." *Id.* This finding of fact, framed as occurring prior to Office Rhodes' search, is unsupported by the record and inconsistent with Officer Rhodes' testimony.

Officer Rhodes was evasive about when he actually spoke to Eric Jones but specifically denied that Jones was the source of his information linking Collins to the motorcycle at the time of the search of the vehicle. At the suppression hearing, the following exchange took place:

(Counsel): So how far in advance of September 10 did you talk to Eric Jones?

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[1] "Goods that are unlawful to import, export, produce or possess." Black's Law Dictionary at 365 (9th ed. 2009)

(Rhodes): I don't recall. It was sometime after the July 25th date. I just don't recall exactly. I don't remember.

(Counsel): Okay. So it must have been Eric Jones who told you that he sold the bike to Mr. Collins?

(Rhodes): I was able to develop that information. Mr. Jones was very difficult to contact and get a hold of basically. **But I was able to get that information that Mr. Collins was supposedly riding that motorcycle based on an informant, yes.**

(Counsel): Based on an informant. **Was that informant Eric Jones?**

(Rhodes): **No it was not.**

(JA 93-94) **(emphasis added).**

And later:

(Counsel): And the motorcycle itself is not, per se, illegal, it's not contraband or anything like that?

(Rhodes): No.

(J.A.98).

Officer Rhodes specifically stated that his intended purpose of the search related to "the felony of eluding" - not related to a crime involving stolen property. J.A.98. Over the course of two hearings and a trial, Officer Rhodes never testified that he had any reason to believe the vehicle was stolen prior to conducting his search.

Probable cause can "only be measured by objective facts known to the police officer prior to the search." *California v. Minjares*, 443 U.S. 916, 921 (1979). Any facts Officer Rhodes gathered after the search of the tarp/motorcycle could not give rise to probable cause. At the time of the search, Officer Rhodes had no reason to believe that the motorcycle was allegedly stolen and probable cause cannot be built on an unknown allegation. *Id.*

Thus, the Supreme Court erroneously concluded that Officer Rhodes had probable cause to believe that the motorcycle was contraband. Slip Op. at 11.

Without facts establishing probable cause to believe the motorcycle was contraband, the automobile exception cannot be relied upon as justification for the warrantless search.

II. The majority opinion erroneously applied the automobile exception to justify a warrantless search of the home's curtilage.

A. The Fourth Amendment requires a sequential analysis.

A case may encompass a series of government actions. The Fourth Amendment requires sequentially evaluating those facts to determine when a search occurred. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *United States v. Moses*, 540 F.3d 263, 272 (4th Cir. 2008). "[T]he basic structure of existing Fourth Amendment law rests on [this] sequential approach." Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 316 (2012). "[T]o analyze whether

government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation." *Id.* at 315. For each fact, this Court must separately determine whether it was a search under the Fourth Amendment and, if so, if it was reasonable. *United States v. Jefferson*, 571 F. Supp. 2d 696,701 (E.D. Va. 2008); Kerr, 111 MICH. L. REV. at 316-20.

This sequential analysis applies with full force to this case. The opinion recognized that this case implicated two Fourth Amendment searches: (1) search of the curtilage[2] and (2) search of the

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[2] The Commonwealth conceded that a Fourth Amendment search of the curtilage occurred. COA Comm. Br. at 10-12. The Commonwealth waived argument to the contrary. Rule 5A:21 (d); *see Jeter v. Commonwealth*, 44 Va. App. 733, 740-41 (2005). Collins noted that this issue was thus uncontested. Op. Br. at 11. The Commonwealth could "not resurrect the issue" abandoned in the Court of Appeals. *Wright v. Commonwealth*, 261 Va. 1, 1 (2000).

This case is not a "knock and talk" limited to the path up the driveway to the front door. *Florida v. Jardines*, 133 S.Ct. 1409, 1415 n.1 (2013). Officer Rhodes walked "something like" "a car length or two" up the driveway. JA 90; Slip Op. at 5. To reach the motorcycle, Officer Rhodes walked past the home's front perimeter. JA 68-69,72-74, 124-26; Slip Op. at 22 n.4 (Mims, J., dissenting). Officer Rhodes did not approach the front door because his goal was the motorcycle sitting beyond and directionally different from the front porch. JA 124, 126. The motorcycle was a few feet from the home's sidewall, where a side porch would sit. JA 126. The motorcycle was enclosed by a "retaining wall" on one side and the house on the other. JA 69, 126.

Officer Rhodes crossed into this private area immediately adjacent to the home to investigate. This was a search of curtilage. *Jardines*, 133 S.Ct. at 1414-17; *United States v. Perea-Rey*, 680

tarp/motorcycle. *See* Slip Op. at 6-7. So did the Court of Appeals. *Collins v. Commonwealth*, 65 Va. App. 37, 622 (2015) ("The first 'search' challenged is Officer Rhodes's entry onto the property to examine the motorcycle.").

This Court did not evaluate the reasonableness of each Fourth Amendment search separately. Instead, the opinion collapsed these two searches into one and answered whether the search of the tarp/motorcycle was reasonable. Slip Op. at 9-16. This Court thus upended "the foundation of existing search and seizure analysis" by disregarding the requirement to sequentially evaluate these searches. Kerr, 111 MICH. L. REV. at 316.

B. This Court's opinion erroneously applied the automobile exception to justify the warrantless search of curtilage.

The opinion recognized two different searches: a search of curtilage, and a search of the tarp/motorcycle. This Court then undertook a single reasonableness analysis, relying solely upon the automobile exception. Consequently, this Court applied the automobile exception to justify a warrantless search of curtilage. Counsel has found no court endorsing such a holding.[3] The automobile

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F.3d 1179, 1188 (9th Cir. 2012) (Fourth Amendment search, not a "knock and talk," when officer "bypass[ed] the front door and walk[ed] around the side of the house into the carport").

[3] The Court's reliance on *United States v. Brookins*, 345 F.3d 231 (4th Cir. 2003) is misplaced because in that case (1) the court found

exception applies to searches of automobiles—not to searches of homes or curtilage. *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (automobile exception applies to "searches of vehicles"); *McClish v. Nugent*, 483 F.3d 1231, 1240-41 (11th Cir. 2007) (warrantless entry into the home excused only by consent or exigency).

The opinion will be read as applying the automobile exception to warrantless searches of curtilage. This is not an unreasonable interpretation, as the opinion itself recounts the Commonwealth asserting this argument. Slip Op. at 6-7. In fact, the Attorney General pressed this argument in the Court of Appeals. COA Comm. Br. at 11-16. There is no reason why this argument, now approved by this Court, will not be used in the future. This application of the opinion will disrupt the careful balance between security and freedom struck by the Fourth Amendment in three significant ways.

First, the opinion can be cited to ignore all searches in any factual sequence except for the final search. This results from the majority opinion disregarding the heightened protections implicated by the initial search (curtilage), to evaluate only the reasonableness of the subsequent search (tarp/motorcycle). *See United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) ("expectation[s] of privacy in an automobile ... are significantly different from the traditional expectation of privacy ... in one's

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that the police had probable cause to believe the vehicle contained contraband, and (2) the issue of whether the police searched the curtilage was neither raised by the parties nor decided by the court.

residence"). For example, a court can replicate the majority opinion's analytical structure by refusing to consider the reasonableness of entry into a home, to evaluate only a subsequent search of a purse or briefcase found inside the home.

Second, this Court's opinion can be cited to ignore Fourth Amendment protections of the home if probable cause relates to a vehicle. On its face, the opinion permits entry into or through curtilage—be it a garage, a carport, or an enclosed side garden—if probable cause relates to an automobile within, or accessible beyond, that curtilage.

Curtilage has the same Fourth Amendment protections as the home. *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001). The opinion's treatment of curtilage instructs how to handle the home's Fourth Amendment protections. For example, entry into and through a home can be held reasonable on the basis that it was a direct route to a vehicle in a back yard. Entry through curtilage to reach a vehicle is legally indistinguishable from entry through a home to reach a vehicle.

Third, as the opinion gives blanket authorization to searches attendant to an automobile search, it invites more invasive warrantless searches with modern technology. The majority opinion articulates no limiting principle to its novel application of the law. As just one example, the opinion may authorize the surreptitious mounting of a recording device on private property if there is probable cause to believe that a vehicle related to criminality will be subsequently recorded. Entry onto property and installation of a device could be held reasonable if the ultimate search is a video recording of a vehicle.

III. Conclusion

For the foregoing reasons, the Appellant, Ryan Austin Collins, respectfully prays that this Court grant his petition for a rehearing.

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